Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1996

JAMES FLANAGAN AND DAVID H. MIDDLETON,
Petitioners,

v.

GERALD AHEARN; JAMES MCADAMS DENNIS; CHARLES W. JEEP; JAMES DRAKE; JUANITA DRAKE; JAMES ELLISON; ROLAND DEARBORN; JUDITH DEARBORN; KERWIN BUTCHER; DIR., WORKERS COMP., DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; PAUL COCHRAN; IDA BECK; MARION BEHEE; LONGSHORE INTERVENOR; WILLIAM JAMES MITCHELL; FIBREBOARD CORPORATION; BETHLEHEM STEEL CORPORATION; CONTINENTAL CASUALTY COMPANY; PACIFIC INDEMNITY; FRANCIS MCGOVERN; OWENS-ILLINOIS, INC.; PENN MUTUAL LIFE INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY; CNA CASUALTY COMPANY OF CALIFORNIA; CELOTEX CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF
OF FLANAGAN AND MIDDLETON

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REPLY BRIEF OF FLANAGAN AND MIDDLETON

I. PREFACE

The brief filed by the Proponents of this non-opt-out class action settlement employs a strategy not unprecedented in human history, but surprising nonetheless: *"IT NEVER HAPPENED!"* There are those who still claim that the Holocaust never occurred; a few flat-Earth enthusiasts still believe — with apparent sincerity — that humankind has not yet reached the Moon.

The Proponents of the Global Settlement accuse these Petitioners of "misrepresent[ing]" a laundry-list of matters: "how this case came before the District Court"; the extent of Judge Parker's "role in the settlement negotiations"; "the fairness hearing proceedings before the District Court"; and "the proceedings below regarding their recusal motion." The Proponents claim, without citation to the record that "The judiciary did not 'script' the Global Settlement."

A reply brief is not the occasion for repeating the contents of the initial petition, but at this juncture Petitioners simply note their citations to the record set forth in their Petition and state simply, "The Court . . . cannot make the record what it is not." *Missouri* v. *Jenkins*, 495 U.S. 33, 49 (1990). ***IT DID HAPPEN!*** The real questions raised by the judicial midwifery involved in the birth of this unprecedented non-opt-out class action are: (1) Whether the trial judge's entanglement precludes the trial judge from passing upon the settlement's fairness; (2) Whether the dangers of such judicial involvement in class-action settlement dictate a bright-line rule mandating that such a settlement be committed to another jurist for scrutiny of its legality and fairness under Fed. R. Civ. P. 23(e).

II. THE *LITEKY* DECISION DOES NOT ADDRESS THE CONCERNS RAISED BY JUDICIAL INVOLVEMENT IN THE CRAFTING OF A CLASS ACTION SETTLEMENT.

Liteky v. *United States*, 510 U.S. 540 (1994), heavily relied upon by the Respondents, does not address the problems

peculiar to class actions and the judicial intervention in the settlement thereof. As stated in the first paragraph of that decision, the issue before this Court in *Liteky* was "whether required recusal under this provision[1] is subject to the limitation that has come to be known as the "extrajudicial source" doctrine." 510 U.S. at 541.

As Justice Scalia wrote:

> It seems to us that the origin of the "extrajudicial source" doctrine, and the key to understanding its flexible scope . . . is simply the pejorative connotation of the words "bias or prejudice." . . . The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree . . .

510 U.S. at 550 (emphasis in the original.) "[T]he pejorative connotation of the terms 'bias' and 'prejudice' demands that they be applied only to judicial predispositions that go beyond what is normal and acceptable." 510 U.S. at 552.

What is "normal" or "acceptable" in the context of a simple, two-party lawsuit with all parties present (whether in open court, a judge's chambers, or a judge's home) is not the measure of what is acceptable in a non-opt-out class action suit. As set out in the original Petition, and in the dissenting opinion filed in the Court below, Judge Parker's expressions of opinion in favor of the Global Settlement — necessarily being against opponents of that settlement — are indeed "excessive in degree" and "go beyond what is acceptable" in a class action case affecting the rights of thousands of absent individuals.

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1 **Referring to 28 U.S.C. § 455(a), which provides for disqualification in "any proceeding in which . . . impartiality might reasonably be questioned."**

III. THE RESPONDENTS' AUTHORITIES DO NOT SUPPORT THEIR POSITION.

The Respondents ignore entirely the cases and other authorities cited by the Petitioners in their Petition. The authorities they do cite do not support their position that the law finds appropriate judicial participation in settlement negotiations "far more extensive" than Judge Parker's in this case.

In re Fernald Litigation, 1989 WL 267039 (S.D. Ohio 1989), provides no support to the Respondents. Indeed, in a later published opinion arising out of the same litigation, the *Fernald* judge, the Honorable S. Arthur Spiegel, ordered a class-action settlement assigned to another judge to conduct the Rule 23(e) fairness hearing. *Day* v. *NLO*, 864 FSupp. 40 (S.D. Ohio 1994).

The facts of that case mirror those of the case at hand. Judge Spiegel noted that the proposed class settlement had been reached after the parties had engaged in week-long "full time settlement negotiations, under the direct supervision of the Court." 864 FSupp. at 41. Noting the necessity for a hearing to review the fairness of that settlement, Judge Spiegel wrote:

> Because of this Court's active and extensive participation in the settlement negotiations, out of an abundance of caution, we find that this fairness hearing should be conducted by one with some greater distance from the struggles that lead to the proposed settlement.

Id. In further support of the reassignment, the court stated:

> In the case at bar, this Court has taken an especially active and affirmative role in settlement negotiations. Some would argue that it would be highly unlikely that a judge who takes this sort of aggressive role would ever fail to find the settlement to be fair, adequate, and reasonable. In other words, it is hard to believe that he could maintain his ability to be the disinterested appraiser en-

> visioned in Federal Rule of Civil Procedure 23(e). Others maintain that the judge, in passing on the fairness of the settlement, may overlook the interest of the absent class members. One can agree that if the Court makes suggestions to be included in the settlement, it can put itself in the position of having such an investment in the settlement that it will be difficult for the judge to objectively determine whether the settlement is fair.

Moreover, even if the trial judge in such a situation should be totally impartial within his or her own mind, the problem of appearances to class members distant in space — and possibly, time — remains.

The Global Settlement at issue herein purports to bar asbestotic claims of persons who have no inkling that they have been exposed to Fibreboard's toxic asbestos products. The Settling Parties hope that the fund established by the settlement will be large enough to pay the future claims, but no one really knows. It is useful to consider the very real possibility that, say thirty years hence, an individual suffering a deadly asbestotic cancer presents a claim under the Global Settlement, only to be advised that the Settlement Fund is "broke". To such a hapless individual, the claim that the federal judge in whose kitchen the settlement was wrought was really totally impartial in passing upon the settlement will "ring hollow", indeed. Simply put, *appearances matter. Liteky*, 510 U.S. at 548 (§ 455(a) requires claims of judicial bias to be evaluated "on an *objective* basis so that what matters is not the reality of bias or prejudice but its appearance.") (Emphasis in the original.)

Respondents trot out one of their favorite quotes from the Johns-Manville Litigation [*In re Joint E. & So. Dist. Asbestos Litigation*, 982 F.2d 721, 733 (2d Cir. 1992)], to the effect that "a judge . . . is not a bystander". The Second Circuit goes on to note that although it may be appropriate for a trial judge to assist in "suggesting constructive solutions and assisting the parties in achieving them",

> Of course, there are limits to the exercise of that role. There is a line to be observed between suggesting the resolution of a dispute and insisting upon it. All who have exercised judicial authority are aware that, unless a judge acts with caution and sensitivity, there is a risk that what the judge tenders as a suggestion will be perceived as a command.

Most of Respondents' authorities are inapposite in that they are not class action matters in which — by definition — there are large numbers of litigants not "at the table" either personally or by counsel. *See, e.g., Wheeler* v. *Southland Corp.*, 875 F.2d 1246, 1251-52 (6th Cir. 1989); *Franks* v. *Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986); *Geneva Assurance Syndicate Inc.* v. *Medical Emergency Serv. Assoc. (MESA) S.C.*, 1993 WL 384566 (N.D. Ill. 1993).

Ackerman v. *Kassar*, 1993 WL 326453 (9th Cir. 1993), to the extent it has any precedential value, does not hold that a jurist involved in settlement negotiations may sit at a Rule 23(e) fairness hearing *over objection* — there was no such objection interposed in that case.

Franks v. *Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986), a non-class-action, involved a motion to recuse, filed more than a year after events — at which the party had been present and registered no objection — occurred. Likewise, in the unpublished decision in *Geneva Assurance Syndicate Inc.* v. *Medical Emergency Serv. Assoc. (MESA) S.C.*, 1993 WL 384566 (N.D. Ill. 1993), a non-class-action, a party which had been at the proverbial table throughout the settlement process registered no contemporaneous objection to judicial involvement.

IV. CONCLUSION

The Respondents cite the case of *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539, 1543 (11th Cir. 1987), for the proposition that judicial participation in settlement is a wonderful thing. The citation to *Greenman* is ironic, for that decision says far more in favor of these Petitioners'

position; indeed, the court in that case reversed the approval of a class-action settlement, stating as it did so:

> We certainly empathize with the district court's desire to bring this case to a just and not untimely end. However, the court took a road not well traveled. In so doing, it ignored Justice Jackson's admonition that "the mere fact that a path is a beaten one is a persuasive reason for following it." Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Col. L.Rev. 1, 26 (1945). While the Congress might well consider forging additional courses to facilitate the expeditious and equitable management of complex cases such as this one, Rule 23, as written, does not support the district court's action.

829 F.2d at 1546.

These Petitioners pray that the Court grant certiorari, overturn the erroneous decisions rendered in the courts below, and safeguard both the appearance and the reality of justice in the approval of class action settlements in the courts of this nation.

Respectfully submitted,

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DATED at Detroit, Michigan
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